IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2015-KA-00971-COA

MARTERIUS C. SANDERS APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Marterius C. Sanders

THIS 14th day of March 2016.

Respectfully submitted,

MARTERIUS C. SANDERS

By: /s/ George T. Holmes
George T. Holmes, His Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lee County where Marterius C. Sanders was convicted of the sale or transfer of a controlled substance and sentenced to eight years as a non-violet habitual offender. Sanders' jury trial was conducted May 27, 2015, with the Honorable Thomas J. Gardner, III, Circuit Judge, presiding. Sanders is presently incarcerated with the Mississippi Department of Corrections. He was represented at trial by the Honorable Kelly Mims of Tupelo.

FACTS

On September 11, 2014, multi-jurisdiction narcotics agent Chris Brown of Tupelo engaged a confidential informant named James White to purchase $200 worth of crack cocaine from a female named Karashawanna Fields in the town of Verona. [T. 111-13, 115-16].[1] Prior to leaving on his mission, White and his automobile were searched and no contraband was found. [T. 117-20, 138-39]. White was given $200 in cash and

[1] James White died before Sanders' trial. [R. 33; T. 37, 179].

provided with an audio-video recording device which was activated by Brown. [*Id.*; Ex. S-3]. White left and headed to a prearranged location to complete the transaction in Verona. [T. 120]. White called Fields on the way as planned and she asked him to go to a different location -- an apartment complex. *Id.*

Over objections, a video recording of what allegedly transpired en route and at the apartment complex was introduced in evidence and shown to the jury. [T. 127-29; Ex. S-5]. The video purportedly shows White and Sanders interacting at the apartment complex. [Ex. S-5]. Still photos from the video were also introduced. [T. 129-33; Ex. S-6].

The video also shows Brown and White having a discussion after meeting back at Brown's office following the alleged drug transaction. [Ex. S-5]. The video is in two parts, the alleged sale portion and then the post-sale interview.[2] Both parts were shown to the jury. [T. 127-33].

Although Brown and other agents were in the area where the alleged transaction took place, they did not maintain eye contact and did not contemporaneously monitor any audio or video transmission. [T. 141]. Brown said they did a "loose surveillance" of the transaction without personally observing White as he allegedly engaged in the exchange of drugs for money, rather the agents remained "a block or two over." [T. 125].

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[2] The DVD of Ex. S-5 actually has two video files on it. The second video file should automatically start when the first one finishes, but that did not always happen when counsel reviewed it. So, care should be taken to make sure both parts or files are viewed.

Afterwards, Brown received a call from White that the deal was complete and they all traveled back to the agents' office. [T. 121, 126].

At the post-sale meeting, White handed Brown what was later tested and shown to be 1.65 grams of crack cocaine. [T. 123-25, 163; Ex. S-4, S-8]. The video shows, and Brown testified, that White told Brown he purchased the purported cocaine from a man named "Greg." [T. 121, 134; Ex. S-5].

Without objection Brown testified he was "able to determine" that the alleged seller on the video tape was Sanders "through [his] investigation of witnesses" and that Sanders used the alias "Greg" or "G." [T. 123, 133-34]. The state offered the testimony of the Verona Interim Chief of Police J. B. Long who testified that he knows Sanders, but that Sanders did not use the alias "Greg" to his knowledge. [T. 170]. Sanders testified later that he did not use the alias "Greg." [T. 171].

Brown testified that he recognized the location at the apartments shown in the video from prior law enforcement activity at that location which included searches and other controlled drug buys. [T. 122]. Chief Long testified that he recognized Sanders on the video and still photos from the video. [T. 165-68]. Chief Long also recognized the location of the sale as being in Verona. [T. 169].

Sanders, testifying in his own defense, said that he knows Fields, a known drug dealer, and admitted that on date in question he was at the apartment complex shown on the video visiting a friends. [T. 177-79, 183]. Sanders admitted that he is in the video

wearing a Nike t-shirt and Nike pants. *Id.* Sanders said he did not know James White. *Id*.

When the prosecutor asked Sanders, who is shown approaching the camera, what he handed the man with the camera, Sanders explained that Fields asked him to grab something out of an apartment when Sanders retrieved his car keys and that he gave the item to Fields not to White. [T. 180-84]. What Fields did with this item Sanders did not know and he testified he did not know what the item was but "obviously [Fields] gave it to the CI." *Id*. Sanders denied transferring or selling crack to White. *Id.* Sanders denied receiving any money. *Id*.

SUMMARY OF THE ARGUMENT

Sanders' rights of confrontation were irreparably prejudiced by the erroneous admission of several instances of hearsay identification evidence. Alternatively, trial counsel was ineffective in failing to object to all of the aforesaid prejudicial hearsay. Counsel was also ineffective by failing to object to irrelevant overly prejudicial evidence and by failing to request a jury instruction on Sanders' defense of mere presence.

ARGUMENT

ISSUE NO. 1: WHETHER SANDERS' DEFENSE WAS PREJUDICED BY THE ERRONEOUS INTRODUCTION OF HEARSAY?

Background

Trial counsel for Sanders filed and argued a pretrial Motion to Suppress Hearsay asking that White's video be excluded on the grounds of hearsay, lack of confrontation and lack of authentication which motion was overruled. [R. 33-39; RE 12-18, T. 35-46]. The Motion To Suppress also requested in the "wherefore" clause suppression of testimony about "any statement or act that White said or did concerning Marterius C. Sanders." [R. 33-39; RE 12-18].

The trial court should have suppressed the post-sale portion of the video where White told Brown that he obtained the cocaine from Sanders who he referred to as "Greg" and should have suppressed all trial testimony about White identifying Sanders as the

seller.

The error regarding the video was perhaps predicated on the trial court, having not seen the video, assum

ing that the video only contained a recording of a controlled drug transaction with no descriptive commentary which followed. [T. 36]. The trial court was unaware that the video contained an audibly discernable post-sale verbal report by White to Brown as to what transpired. It was in this post-sale debriefing of White that Sanders was identified as the seller.

At the hearing on Sanders' Motion to Suppress, the prosecutor told the trial court that the audio portion of the recording was inaudible and that the state was not "relying on any audio commentary" from the video, rather "the State is relying on the actions taking place in the video." [T. 36-37]. However, during trial Agent Brown was asked by the prosecutor to describe what occurs on the recording and Brown described that during the post-sale portion of the video he took "a brief statement from [White] that you'll hear on the audio towards the end." [T. 128]. Anyone listening to the post-sale portion of the video can hear White telling Brown that he obtained the drugs from "Greg." [Ex. S-5].

Defense counsel did not object to Brown's testimony about White's identification of Sanders apparently because counsel concluded that the same identification was in the video which had been ruled admissible, as he stated to the trial court, "You've already ruled on the video, Your Honor, and, in general, all statements " [T. 80].

Argument

Introduction of the video portion of the post-sale interview coupled with Brown's recitation to the jury that White told him Sanders was the seller resulted in Sanders' Sixth Amendment right to confront his accusers being violated. An added component of this hearsay identification was Agent Brown's testimony that his investigation and speaking with other unnamed persons led him to the conclusion that "Greg" was Sanders. Sanders was convicted on the statements of White and other persons who did not testify at trial. He respectfully looks to the Court of Appeals for redress.

For purposes of this argument, all of the objectionable hearsay and particularly the objectionable portion of the video and Brown's repeating what White said are treated the same and the authorities cited below apply equally to all of it. Furthermore, all issues regarding the hearsay identification of Sanders in White's post sale interview, whether through Brown or through the video, were preserved by Sanders' pre-trial Motion to Suppress and renewal of any objections were not necessary. *Goff v. State*, 14 So. 3d 625, 640 (Miss. 2009); *Kettle v. State*, 641 So. 2d 746, 748 (Miss. 1994).

If the appellate court here finds that the issue is not preserved, there is an additional argument in Issue No. 2 that trial counsel's failure to renew the objection or otherwise object to the hearsay identification of Sanders by Agent Brown covered and not covered by the motion in limine resulted in ineffective assistance of counsel.

The hearsay identification of Sanders as the seller prejudiced Sanders because no

eye witness to the alleged transaction testified and Sanders had no opportunity to cross-examine White. The sale portion of video is inconclusive as to what actually happened and what was said at the apartment complex; multiple persons are heard and seen on the video. [Ex. S-5]. Since the video is inconclusive as to what transpired at the apartment complex, the hearsay identification of Sanders as the seller was key to the state's case here. The hearsay identification of Sanders corroborated the state's interpretation of the video and contradicted Sanders' testimony.

Admission of hearsay is reviewed under an abuse of discretion standard, and the erroneous admission of hearsay resulting in prejudice to a defendant requires reversal. *Brown v. State*, 969 So. 2d 855, 860 (¶ 13) (Miss. 2007); *Murphy v. State*, 453 So. 2d 1290, 1294 (Miss. 1984).

Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Miss. R Evid. 801. "Hearsay is incompetent evidence ... [and it] is not admissible except as provided by law." *Quimby v. State*, 604 So. 2d 741, 746-47 (Miss. 1992). Hearsay is inadmissible, except under certain exceptions, and when improperly admitted constitutes reversible error. *Brown, supra,* 969 So. 2d 860 (¶ 13); *Murphy, supra,* 453 So. 2d 1294; Miss. R. Evid. Rules 802, 803 and 804.

Testimony of police officers and investigators about the results of investigations based on what they were told is inadmissible hearsay, which if admitted, is reversible

error. *Bridgeforth v. State*, 498 So. 2d 796, 800 (Miss. 1986). In *Edwards v. State*, 736 So. 2d 475, 477-79 (Miss. Ct. App. 1999), the court reversed a murder conviction in part on the wrongful admission of hearsay. The *Edwards* opinion reflects the importance courts have traditionally placed on a defendant's right of cross-examination and how the admission of hearsay evidence can thwart the exercise of this right. *Id*.

The inherent problem here in Sanders' case is that since no one with first hand knowledge of the alleged drug transaction testified, the very person who identified Sanders as the seller was not cross-examined which thwarted Sanders' confrontation rights. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004); U. S. Const. 6th Amend., Art. 3, §26, Miss. Const. (1890).

In *Crawford*, Crawford was convicted of assault with a deadly weapon for stabbing a man who allegedly tried to rape his wife. 124 S. Ct. at 1356-58. A recorded statement of Crawford's wife given to investigating officers was introduced at trial against Crawford because the wife was "unavailable" under the marital privilege which did not extend to the spouse's out of court statement. *Id.* The U. S. Supreme Court ruled that admission of the wife's recorded statement violated the Confrontation Clause. *Id.* at 1359.

The end result of the *Crawford* decision is that, if testimonial hearsay is offered because a witness is unavailable, there must have been a prior opportunity for cross-examination by the accused for the declaration to be admissible. *Id*. at 1364-65. Here,

Sanders never had the opportunity to cross-examine White who was deceased.

In *Corbin v. State*, 74 So. 3d 333 (Miss. 2011), Corbin was convicted of murder in relation to an automobile wreck. One of the victims in the wreck gave a statement to police, but died before trial. This witness' statement that Corbin intentionally caused the wreck was introduced at trial over objection. *Id.* at p. 337 (¶ 7). The statement was not a dying declaration. The error was addressed as plain error because Corbin's trial counsel did not make a specific objection referencing *Crawford, supra.* 74 So. 337 n. 14 and 15.

A statement is "testimonial," if it is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*. at 337 n. 6. Testimonial statements include, among others, "police interrogations" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. (Citing *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354). (See also *Hobgood v. State*, 926 So. 2d 847, 852(¶ 12) (Miss. 2006): "[A] statement is testimonial when it is given to the police or individuals working in connection with the police for the purpose of prosecuting the accused.").

The deceased's witness' statement in *Corbin* was found to be testimonial and erroneously admitted because it "was made for the purpose of assisting police with its investigation, the purpose was prosecutorial." *Id*. at. 338 (¶14). Under these guidelines, White's identification of Sanders as the person who sold the cocaine was testimonial. It was made by a person involved in a criminal investigation to the lead investigator about

the identity of the perpetrator. Also, under *Corbin*, the issue here is addressable as plain error if the court finds Sanders' counsel did not otherwise preserve the error.

In *Quimby, supra,* a police detective was allowed to repeat what a forgetful child victim recounted about her alleged abuse. 604 So. 2d 746-47. The *Quimby* court said, "[o]ur hearsay rule, M.R.E. 802, states in no uncertain terms that '[h]earsay is not admissible except as provided by law. The prohibition is loud and clear. 'Hearsay is incompetent evidence.'" *Id*.

In *Ratcliff v. State*, 308 So. 2d 225, 226-27 (Miss. 1975), a police officer was allowed to testify about what a witness had told him during the officer's investigation. The court said, "[i]nvestigators cannot be permitted to relate to a jury hearsay which is incriminating in its effect as to a defendant on trial for a crime . . . [w]hat an informant told [the investigating officers] was hearsay and inadmissible to the jury." *Id.* The *Ratcliff* court reversed and remanded the armed robbery conviction based, in part, on the circumvention of the defendant's cross-examination rights which resulted from the admission of the hearsay. *Id*. The same result is called for here in Sanders' case.

These cases support the conclusion that the trial court here in Sanders' case was legally bound to exclude the hearsay identification of Sanders in the video as well as repeated by Agent Brown in his testimony. Sanders' conviction here was founded on incompetent hearsay, and should, therefore, be reversed.

If the court here finds that the issue was not adequately preserved, a plain error

review is requested as done in *Corbin, supra.* Under plain error review the appellate court "can recognize obvious error which was not properly raised by the defendant on appeal, and which affects a defendant's 'fundamental, substantive right'" such as a violation of the Confrontation Clause "which seriously affects the "fairness, integrity or public reputation of judicial proceedings." *Corbin,* 74 So. 3d at 337; see also *Moore v. State*, 986 So. 2d 959, 961(¶8) (Miss. Ct. App. 2007); *Bevill v. State*, 669 So. 2d 14, 17 (Miss. 1996).

ISSUE NO. 2: WHETHER SANDERS WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL?

If the appellate court here finds that the claimed hearsay errors addressed in Issue No. 1 were not preserved and not reviewable as plain error, then trial counsel was ineffective for failing to adequately object and obtain a clear ruling from the trial court, and by failing to clarify to the trial judge that the video evidence contained more than just what transpired during the alleged controlled drug sale and by failing to object to all of the hearsay identification evidence of Sanders set out in Issue No. 1. Additionally, Sanders also maintains that his trial counsel was ineffective by failing to object to overly prejudicial irrelevant evidence and by failing to seek a jury instruction on Sanders' defense of mere presence.

Whether a criminal defendant has received ineffective assistance of counsel is a question of law reviewed *de novo* by a two-part analysis: "[f]irst, the defendant must show that counsel's performance was deficient ... Second, the defendant must show that

the deficient performance prejudiced the defense." *Taylor v. State*, 167 So. 3d 1143 (¶ 5) (Miss. 2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052(1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Ransom v. State*, 919 So. 2d 887, 889 (Miss. 2005) (Citing *Strickland,* 466 U.S. at 686). See also, *Stringer v. State*, 454 So. 2d 468, 476 (Miss. 1984); *Madison v. State*, 923 So. 2d 252, 255 (¶10) (Miss. Ct. App. 2006); Amend VI, U. S. Const.; Art. 3 §26, Miss. Const. (1890).

If the issue of ineffective assistance of counsel is raised, as is here, on direct appeal the court will look to whether:

> (a) . . . the record affirmatively shows ineffectiveness of constitutional dimensions, or (b) the parties stipulate that the record is adequate and the Court determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc. are not needed. *Madison, supra,* 932 So. 2d at 255.

The bases for all of the ineffective assistance claims here are apparent from the record. Otherwise, Sanders hereby stipulates through present counsel that the record is adequate for this court to determine this issue and that a finding of fact by the trial judge is not needed.

Failure to Adequately Object to Hearsay

If the Court finds that trial counsel's objections to hearsay were inadequate, then such deficiency resulted in Sanders' Sixth Amendment rights of confrontation being violated. When the video was offered, trial counsel renewed the pretrial objections, but

there was no further objection to other hearsay testimony which was presented by the state which pertained to the identification of Sanders as the person who transferred the cocaine to White. [T. 121, 127-29; Ex. 5]. Trial also counsel failed to object to the hearsay identification of Sanders when Brown testified he was "able to determine" that Sanders appears on the video tape "through [his] investigation of witnesses." [T. 123].

When the drug evidence was offered after this testimony, trial counsel did say, "No objection as to what [Brown] received from the CI. I would object to [Brown's] other testimony, though." [T. 125]. This objection was not contemporaneous to the hearsay, however. The failure to make a contemporaneous objection can result in a waiver of the issue on direct appeal. *Wells v. State*, 698 So. 2d 497, 514 (Miss. 1997); Miss. R. Evid. 103.

If the Motion to Suppress as argued was not broad enough to include the identification from White's post-buy debriefing, then it was ineffective assistance of counsel for Sanders' counsel not to object or broaden the arguments against such hearsay.

These failures clearly meet the *Strickland* test. A lawyer's performance is deficient when that lawyer allows damaging evidence to be presented against his or her criminal client when the lawyer knows that the evidence should be excluded as irrelevant or incompetent. *Taylor, supra,* 167 So. 3d at 1146-47 (¶¶ 5-8).

In *Taylor, supra,* the Supreme Court reversed a receiving stolen property conviction on Taylor's trial counsel failing to object to the State's extensive cross-

examination regarding Taylor's prior convictions. *Id*. Even recognizing that there is a presumption that not objecting to the evidence might have been trial strategy, the *Taylor* Court said it could not "conceive a trial strategy that would justify failure to object to the introduction and detailed description of the defendant's seven or eight previous felony convictions." *Id*.

The State's extensive cross-examination regarding Taylor's numerous prior felony convictions "was clearly more prejudicial than probative in a case that largely turned on the respective credibility of Taylor and the State's main witness." *Id*.

The same rationale applies here to Sanders' case where the identification of Sanders as the seller was based on nothing but hearsay. There was no sound reason to allow the prosecution to present such incompetent hearsay as substantive proof of guilt.

Failure to Object to Irrelevant Evidence

Trial counsel also did not object to Brown testifying that he had conducted or participated in "at least three search warrants" at the same location along with other controlled buys. [T. 122]. This allowed the state to present evidence of guilt by association since Sanders testified he knew Fields and was hanging out with friends who lived at the apartment complex.

Guilt by association is not a recognized principle of criminal law. *Davis v. State*, 586 So. 2d 817, 821 (Miss. 1991). Therefore, whether other drug activity had occurred at the subject apartment complex was irrelevant.

The same principles from *Taylor, supra*, apply to this irrelevant yet prejudicial testimony. What had taken place at the apartment complex at other times involving other people was totally irrelevant to Sander's case, yet the implication tying Sanders to the location was very damaging. There was no sound defense strategy in allowing the prosecution to present such incompetent evidence.

Failure to Request Defense Instruction

Additionally, Sanders respectfully suggests that his trial counsel was constitutionally ineffective for failing to request that the jury be instructed on mere presence, his sole defense.

Sanders, like all criminal defendants, was entitled to have his theory of the case presented to the jury in jury instructions. *Sayles v. State*, 552 So. 2d 1383, 1390 (Miss. 1989). "A defendant is entitled to have instructions on his theory of the case presented, even though the evidence that supports it is weak, inconsistent, or of doubtful credibility." *Ellis v. State*, 778 So. 2d 114, 118 (¶ 15) (Miss. 2000) (citing *Giles v. State*, 650 So. 2d 846, 854 (Miss. 1995)).

Mere presence, even with the intent of assisting in the crime, is insufficient "unless the intention to assist was in some way communicated to [the principal]." *Hughes v. State*, 983 So. 2d 270, 276 (Miss. 2008). See also *Caston v. State*, 823 So. 2d 473, 507 (Miss. 2002)

Sanders was therefore entitled to an instruction with language such as:

> Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. *Fortenberry v. State*, No. 2013-KA-00134-COA, 2015 WL 4731084, at ¶ 29 (Miss. Ct. App. Aug. 11, 2015), reh'g denied (Feb. 2, 2016).

Because no such instruction was given here, the jury here did not know how to deliberate on Sanders' claim that he might have handled the cocaine as an unknowing conduit or that he was just a mere spectator. The lack of a defense theory instruction here affected the outcome of the trial adversely to Sanders' constitutional guarantee of due process and a fair trial. No conceivable trial strategy exists to justify counsel's failure to request a mere presence instruction since this was Sanders' sole defense.

In *Blunt v. State*, 55 So. 3d 207, 208-12 (¶¶ 4, 9-10, 13, 16-17) (Miss. Ct. App. 2011), the Court of Appeals found that Blunt's trial counsel was ineffective, under a plain error analysis, for not requesting a proper instruction which accurately stated the applicable rules of law on self-defense. Sanders' counsel was likewise ineffective.

In *McTiller v. State,* 113 So. 3d 1284, 1291-92 (¶¶ 22-24) (Miss. Ct. App. 2013), the defendant's trial counsel did not request an instruction on several defenses available to McTiller upon which his whole defense rested. *Id*. The Court of Appeals reversed finding that McTiller's counsel was prejudicially ineffective.

Therefore, Sanders asks the Court to reverse and grant a new trial on the grounds of ineffective assistance of counsel.

CONCLUSION

For the forgoing reasons, Sanders respectfully requests to have his conviction herein reversed with remand for a new trial.

Respectfully submitted,

MARTERIUS C. SANDERS

By: /s/ George T. Holmes
George T. Holmes, His Attorney

CERTIFICATE

I, George T. Holmes, do hereby certify that I have this the14th day of March, 2016, electronically filed the foregoing Brief with the Clerk of the Court using the MEC system which issued electronic notification of such filing to Hon. Jason L. Davis, Assistant Mississippi Attorney General; and, counsel also this day mailed a hard copy to the following persons not notified by the MEC system by U. S. Mail, first class postage prepaid: Hon. Thomas J. Gardner, III, Circuit Judge, P. O. Box 1100, Tupelo MS 38802, and to Hon. Trent Kelly, Dist. Atty., P. O. Box 7237, Tupelo MS 38802.

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